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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 IN RE GLOBAL BROKERAGE, INC.  
f/k/a FXCM INC. SECURITIES  
LITIGATION

17 CV 916 (RA)

5 -----x

ARGUMENT

6  
7 New York, N.Y.  
8 March 6, 2019  
11:10 a.m.

9 Before:

10 HON. RONNIE ABRAMS,

11 District Judge

12 APPEARANCES

13 THE ROSEN LAW FIRM  
Attorneys for Plaintiffs  
14 BY: PHILLIP C. KIM  
JOSH BAKER

15 KING & SPALDING  
Attorneys for Defendants  
16 BY: PAUL R. BESSETTE  
17 REBECCA MATSUMURA  
ISRAEL DAHAN  
18

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1 (Case called)

2 MR. KIM: Good morning, your Honor.

3 Phillip Kim and my associate Josh Baker from The Rosen  
4 Law Firm, for plaintiffs.

5 THE COURT: Good morning.

6 MR. BESSETTE: Good morning, your Honor.

7 Paul Bessette of King & Spalding, on behalf of the  
8 defendants.

9 And my colleagues will introduce themselves.

10 MS. MATSUMURA: Rebecca Matsumura.

11 THE COURT: Good morning.

12 MR. DAHAN: Israel Dahan.

13 THE COURT: Good morning to you.

14 So we have defendant's motion.

15 Who would like to be heard?

16 MR. BESSETTE: Your Honor, since it's our motion, we'd  
17 be happy to be heard first.

18 THE COURT: Yes. Thank you.

19 MR. BESSETTE: May it please the Court, Paul Bessette,  
20 on behalf of the defendants.

21 This Court gave specific guidance to the plaintiffs  
22 the first time around to plead facts rather than conclusions to  
23 state a viable claim for securities fraud.

24 To get to the heart of the matter, this case is about  
25 an arm's-length contract during the class period in which FX

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1 was supposed to make order flow payments to FXCM and, according  
2 to plaintiffs, that, in reality, was a pretext for a secret  
3 profit-sharing agreement. The viability of the second amended  
4 complaint rises or falls on this allegation and, we submit,  
5 your Honor, that it falls.

6 First, preliminarily, courts are rightly skeptical of  
7 fraud claims based like this on pretextual secret  
8 relationships. We cited several cases about that. One of the  
9 common things in those cases, your Honor, both *SkyPeople Fruit*  
10 *Juice* in this Court of 2012, and *Verizon Communications* in  
11 2001, both in the reply brief at footnote 2, there's a common  
12 theme, which is that this pretext conclusion in those cases and  
13 others was unsupported by particular and sufficient facts. And  
14 that is the same thing that's true here.

15 They plead no facts to support the secret  
16 profit-sharing relationship critically during the class period.  
17 Their facts and conclusions are prior to the class period and  
18 they are really cut-and-pasted from the unadjudicated  
19 complaints and no admit/no deny settlements from the CFTC and  
20 the NFA.

21 But the fact that regulators made these conclusory  
22 allegations doesn't mean that plaintiffs have met the PSLRA  
23 pleading burden by just lifting those and putting them in. We  
24 understand that wasn't sufficient to strike them under Rule  
25 12(f), but we submit it's not sufficient under their pleading

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1 burden to survive a 12(b)(6) motion. Why? Because companies  
2 settle civil cases like this all the time without regard to the  
3 strength of the allegations. There are a lot of reasons they  
4 settle.

5 So you ask yourself what is required then? And one of  
6 plaintiffs' cases answered that point well in the *Bristol-Myers*  
7 *Squibb* case, again in this Court of 2008. The Court found that  
8 a secret side agreement was adequately pleaded where plaintiffs  
9 relied on the company's guilty plea of fraud for that very  
10 reason. That is a far cry from an unadjudicated allegation in  
11 a civil lawsuit brought by regulators who don't even enforce  
12 the securities laws.

13 THE COURT: But are they just relying on the civil  
14 allegations? Don't they do a better job this time around of  
15 specifically identifying the statements at issue, among other  
16 things?

17 MR. BESSETTE: Well, your Honor, I do admit that this  
18 second amended complaint is certainly a better cleaned-up  
19 version than the first amended. The statements are identified,  
20 they are not block quoted and all of that.

21 But when you look at what the statements are, they are  
22 not sufficient. And here's why. So that was some background  
23 on what the case law says.

24 What we have here, when you strip the conclusions  
25 away, right, so the conclusions are a secret side agreement.

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1 Where are the facts?

2 The class period started in March of 2012.  
3 Plaintiffs' own allegation at paragraph 61 of the second  
4 amended complaint, FX paid on order flow and volume \$21 per  
5 million dollars of notional order flow. And in September of  
6 2011, again, before the class period, that was dropped to \$16  
7 per million of order flow. It's not based on profit, it's  
8 order flow. And then at the class period in March, that number  
9 was never adjusted for profits or losses or anything.

10 In fact, plaintiffs allege that from that period  
11 forward, since FXCM had spun out FX, no controlling interest,  
12 it was its own stand-alone company, they provided support for a  
13 year. But at the beginning of the class period, it stood on  
14 its own; its expenses went up. That \$16 never changed. It was  
15 based on an order flow. There was a services agreement which  
16 plaintiffs allege. That's the basis for the payment.

17 So the fact that FXCM may have, quote/unquote, birthed  
18 and spun out FX, and maybe the \$21 original order flow payment  
19 might have been based on some notion of where the profit was,  
20 at the time the class period started, it's a stand-alone  
21 company with a contract to pay based on order flow. And that's  
22 what the facts are.

23 So everything else is a conclusion that they are  
24 trying to draw, conclusions that the CFTC put in their  
25 complaint, again, unadjudicated, no admit, no deny. There are

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1 no facts, when you strip the conclusions away from the  
2 allegations, to show that these payments were anything but  
3 order flow and based on order flow.

4 In fact, your Honor, at paragraph 70, plaintiffs even  
5 admit that FXCM directed FX to limit its share of the trading  
6 volume. So if they were still having a secret profit-sharing  
7 relationship, you certainly wouldn't expect FXCM to say, FX,  
8 lower your volume, lower the profitability. It just doesn't  
9 make sense. That's why I'm saying if you look at the  
10 statements, your Honor, and you make sure you have the time  
11 period, the class period, which starts in March of 2012, there  
12 are no facts from that point forward to show that these  
13 payments were anything other than what was contracted for,  
14 which is order flow and volume. And that is why, your Honor,  
15 we submit that the false and misleading statements, they fall,  
16 because there is no profit-sharing arrangement.

17 So for example --

18 THE COURT: Just let me ask you, didn't the order flow  
19 match the original agreement with Dittami?

20 MR. BESSETTE: The allegations in the second amended  
21 complaint and, frankly, in the underlying regulatory agency  
22 complaints, are that the \$21 was sort of a proxy for a certain  
23 profit level. We don't submit that that's -- that's what's  
24 pleaded. But my point is that was prior to the class period.  
25 That one was when the person was still either -- Dittami or

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1 whatever his name is, part of FXCM or just after they were spun  
2 out. But they were spun out before the company went public at  
3 the end of 2010.

4 The class period starts in March of 2012. At that  
5 point in time, there are service agreements, there are  
6 disclosures by FXCM that we have these arrangements for order  
7 flow. And all the payments at that point were based on \$16 per  
8 million dollars of order flow. And they weren't changed  
9 throughout the class period until it ended in 2014, halfway  
10 through the class period. There's no adjustment, up or down,  
11 for profits or losses; it's \$16 per million based on an  
12 agreement.

13 So what you really have here, your Honor, if you look  
14 at this, is, yeah, they might have started this company, spun  
15 it out, approximated profits. But then it's a stand-alone  
16 company on its own, there's a contract, they adjust the price.  
17 And at the time the class period starts, which is the critical  
18 point here, in March of 2012, there is no adjustments for  
19 profit or loss. There is nothing but \$16 per million of  
20 notional volume. That's what it is. There's no facts in the  
21 complaint to show otherwise. All their facts are prior to the  
22 class period starting.

23 Frankly, your Honor, if you step back and look at  
24 this, it's like you could bring a securities fraud claim  
25 against any company who may have had some arrangement, an

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1 affiliate, but then spun him out. And the period that the  
2 class period starts, plaintiffs can just say, Oh, no, you just  
3 papered that up. No, this is not real. This is a secret side  
4 agreement. You just carried it through.

5 Any company could be liable for that. They have to  
6 have facts. And all their facts are pre IPO -- I'm sorry, pre  
7 class period, class period, which is when we have to look at  
8 the false and misleading statements. There is nothing to show  
9 a profit-sharing relationship. And that is why -- well, a  
10 couple of things.

11 First, the company admitted on August 1st of 2014 that  
12 these order flow payment arrangements stopped. So by  
13 definition there can be no false and misleading statement after  
14 that date, because that's the very basis for the allegation  
15 that all of the statements are false, because there was a  
16 profit sharing relationship. We submit there wasn't one, but  
17 there was an order flow arrangement and that, by itself,  
18 terminated in August of 2014.

19 THE COURT: I'm going to confirm that plaintiffs don't  
20 disagree with that. Do you mind if I just break in, Mr. Rosen?

21 Is there any dispute about that, about the timing with  
22 respect to 2014?

23 MR. KIM: Well, paragraph 61 of the complaint, with  
24 respect to whether these order flow payments were changed, talk  
25 about how they were changed. And I believe they were adjusted

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1 to \$16 per million during the class period. The class period  
2 starts in 2012, but the conduct here, if you look at the  
3 regulatory complaints, span from 2010 to 2014. So the notion  
4 that none of this happened during the class period is just  
5 wrong.

6 THE COURT: I was just focusing on the 2014 date as  
7 being the end period.

8 MR. KIM: August 1st, 2014 is when the defendants say  
9 the services agreement was terminated.

10 THE COURT: All right. Thanks.

11 I didn't mean to interrupt, Mr. Bessette.

12 MR. BESSETTE: That's fine, your Honor.

13 And I just want to point out the drop from \$21 to \$16  
14 was pre class period; it was September of 2011. The class  
15 period starts March of 2012.

16 And again, plaintiffs fail to point any facts to  
17 support their belief that an improper relationship between the  
18 two companies outlasted the cessation of the order flow  
19 payments in August of 2014. In fact, their opposition does  
20 nothing except put the burden on us. In fact, he says, Just  
21 because one profit-sharing payment mechanism may have been  
22 ceased does not mean that the company must have abandoned its  
23 improper profit-sharing relationship.

24 That's really what they are saying is, Well, it may  
25 have continued past '14, we don't really know. Just because of

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1 this -- that's not meeting their pleading burden. They have no  
2 facts pled to show beyond August of 2014 at a minimum. We  
3 think there's no facts pled at the beginning of the class  
4 period to show a profit-sharing relationship.

5 Some other statements, again, because the whole second  
6 amended complaint rises or falls on the basis of a  
7 profit-sharing relationship, when there is none, because none  
8 has been adequately pled from the beginning of the class  
9 period, then you see that all the other things fall away.

10 For example, they make a big deal about how the  
11 company violated GAAP. And the basis for that, the very  
12 foundation of that is, Well, there was an improper  
13 profit-sharing relationship, so there must have been an  
14 affiliate relationship, there must have been a variable --

15 THE COURT: Wasn't there still a relationship with FX  
16 that they didn't disclose?

17 MR. BESSETTE: I would submit no, your Honor. They  
18 disclosed that FX was one of the many liquidity providers and  
19 that they had order flow payments. That's all true.

20 The only thing -- plaintiffs saying, Well, you didn't  
21 disclose that you had a secret profit-sharing relationship.  
22 Well, we didn't. There are no facts pled. The facts pled are  
23 pre class period, when the company -- when FXCM spun out and  
24 supported FX well before the class period started, and then had  
25 service agreements, a set \$16. And you know during the class

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1 period FX's expenses went up because FXCM wasn't supporting  
2 them. Well, where is the profit-sharing then? When is the  
3 adjustments? None of that is pled because it didn't happen.

4 You really have to look at the allegations and keep  
5 the class period in mind, because this is a classic example of  
6 a company birthing another company, an affiliate, having a good  
7 idea and then saying, You know what? You're right, compliance  
8 department, we can't keep -- let's spin them out. We'll help  
9 them out a little bit; they'll become one of our service  
10 providers; we're going to get order flow volume. And they may  
11 have targeted 30 percent pre class period, but they never  
12 adjusted that. It never changed. It was paper, they are  
13 severed companies, no ownership interest, and order flow  
14 payments only, from the beginning to halfway through the class  
15 period when all of that ended in August of 2014.

16 And because there's no profit-sharing relationship,  
17 there's no GAAP violation. Why would E&Y, one of the top  
18 auditors in the world, either before or after all this became  
19 public, require a restatement? There's no profit-sharing.  
20 There are no facts to show that. There was no GAAP violations,  
21 no restatement. The Second Circuit requires objective facts  
22 under the case law to show a GAAP violation. There's nothing  
23 here. That's because there's no profit-sharing relationship  
24 sufficiently alleged.

25 Let me turn briefly to *scienter*, because that's,

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1 again, another place that the SAC just falls short. Because if  
2 you don't have the foundation, if you don't have the predicate  
3 of a profit-sharing relationship, then you don't really have an  
4 intent to deceive or defraud. And you can see that.

5 What you have, the facts that are pled, actually show  
6 that FXCM was trying to comply. The inference is the opposite  
7 of an intent to deceive or defraud. It is, Okay, plaintiffs  
8 admit that FXCM spun off FX in response to concerns from its  
9 compliance department. Again, pre class period.

10 That Dittami resigned from FXCM and was no longer  
11 employed after the spin-off, and that they admit FXCM further  
12 separated FX over time, again, all up to even before the class  
13 period started. And the fact that FXCM let FX use its offices,  
14 email servers in the immediate time after the spin-off, they  
15 don't allege that that lasted beyond a year. And again, that  
16 is right before the class period.

17 So, yes, the obvious inference is FXCM was trying to  
18 do this right, listen to its compliance department. It  
19 couldn't have a profit-sharing relationship. It set up the  
20 company on its own to help them a little bit. But at the  
21 beginning of the class period, it's a stand-alone company, FXCM  
22 has no ownership interest, and all the payments are based on  
23 order flow. That was fully disclosed.

24 So you can't take, Oh, we think what you did over here  
25 before the class period somehow permeated into the class

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1 period. We don't have any facts; we just got conclusions. And  
2 the facts we do plead actually show it was based on order flow  
3 and survive a motion.

4 Certainly in PSLRA pleading burdens and *scienter*, when  
5 you have to have a cogent, strong inference of *scienter*, what  
6 we have here is actually the inference that cuts the other way,  
7 that the company was trying to do it right. Maybe they got it  
8 right, maybe they got it wrong. E&Y never came after them for  
9 violating GAAP or anything else. The regulators never alleged  
10 any of that.

11 Just to wrap up, your Honor, one of the things that  
12 you tasked plaintiffs with the first time around was to show  
13 even if what you allege, how is that an intent to defraud  
14 investors versus the regulators who don't have any jurisdiction  
15 over the securities laws or investors?

16 THE COURT: Or versus the customers.

17 MR. BESSETTE: Or versus the customers, right.

18 If you step back, you say, Even if what plaintiffs  
19 allege is true, okay, you had this relationship, it may be so  
20 volume was being sent to FX because you were getting a cut of  
21 that. We dispute all of that. But at the end of the day, what  
22 does that do? It benefits FXCM and, therefore, its  
23 shareholders. It's not a fraud on shareholders. It may have  
24 been hiding the ball of the consumers or the people who were  
25 doing the trading.

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1 THE COURT: But why isn't it a fraud on investors who,  
2 assuming the truth of the allegations, didn't know that there  
3 was this system that was harming customers in this way and that  
4 they would not have invested had they known that there was this  
5 secret agreement?

6 MR. BESSETTE: But it's not a harm to the investors,  
7 your Honor. I would say maybe they might have been  
8 distasteful, maybe they wouldn't have invested, but is there  
9 harm to the shareholders, assuming the truth of the  
10 allegations? No, I would submit that it actually benefited  
11 shareholders; that the company would have more profit because  
12 it was directing the order flow to FX. There's no harm to the  
13 investors.

14 THE COURT: So you think in a situation where there's  
15 a fraud on customers, if the investors are making money in the  
16 short-term, even though they are investing in a company that's  
17 dependent on fraud, that's not a fraud on the investors?  
18 Assuming material misstatements, *scienter*, etc.

19 MR. BESSETTE: I would say that's right, your Honor.  
20 I would say that's exactly right.

21 And it's certainly not an intent to deceive or defraud  
22 the shareholders. It may have, at most, been an intent to hide  
23 the ball to consumers or people who are in the market and/or  
24 regulators; but, again, those regulators have no jurisdiction  
25 over the securities laws, so you can't take the inferential

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1 leap to say because you -- and they try to do this in the SAC,  
2 is because they hid the ball with the regulators, maybe weren't  
3 fully truthful in the interviews or what have you, that  
4 demonstrates an intent to deceive or defraud. No.

5 If that had happened to the SEC, which had  
6 jurisdiction over the securities laws, then yes. And there's  
7 case law to show that. There is no case law anywhere -- and  
8 they haven't cited any -- that says that statements which  
9 allegedly misled an agency not charged with protecting  
10 investors is sufficient to plead *scienter*. There's just no  
11 case to say that because it doesn't make common sense.

12 Before I finish, I should say there is nothing -- to  
13 get to defendant Lande, there is nothing in the complaint that  
14 he had any involvement with FX. At a minimum, he should be  
15 dismissed from this case.

16 With that, your Honor, unless you have any questions,  
17 I'll reserve my time.

18 THE COURT: All right. Not for now. Thank you.

19 MR. BESSETTE: Thank you.

20 MR. KIM: Good morning, your Honor.

21 Phillip Kim, Rosen Law Firm, for the plaintiffs.

22 THE COURT: Mr. Kim, can you start by kind of  
23 answering the premise of defendants' argument, which is that  
24 there aren't facts alleged during the class period regarding  
25 this illicit profit-sharing agreement.

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1 MR. KIM: Well, that's just incorrect, your Honor.

2 THE COURT: Just walk me through the complaint. Just  
3 take me to the pages. I have the second amended complaint  
4 right here.

5 MR. KIM: Well, your Honor, of course we acknowledge  
6 that prior to the class period the FXCM entity was spun out.  
7 And according to the regulatory actions and the penalties, the  
8 profit-sharing or the illicit payments and the hiding of this  
9 agreement and arrangement continued through 2014. We do allege  
10 that in the complaint. It's throughout the complaint where we  
11 allege the background of the formation of the entity and also  
12 continuing through the class period.

13 Now, we do acknowledge in the complaint that our  
14 assertion with respect to statements regarding whether the  
15 company has a no dealing desk, right, there are three  
16 categories of misstatements we have in the case. So the first  
17 category are the statements that the platform is free of  
18 conflicts, it's a no-dealing desk, it was sort of the primary  
19 aspect of their business, right. Because previously to this,  
20 they had a dealing desk where they were on both sides of the  
21 trade and they made some money off the trade. Then they  
22 switched to this agency model that they were telling investors  
23 and also consumers, because these statements, as we allege,  
24 were made in 10-Ks and 10-Qs, and those are directed to  
25 investors. And those were the statements that we focused on,

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1 paragraph 146 and continued thereon. Those were the statements  
2 regarding the conflict-free agency model. And that model is is  
3 that they take a commission on the bid and ask, and that's it.  
4 They don't have an interest on how the trade plays out. But  
5 that wasn't the case. And that continued from 2010 to 2014.

6 Now, after August 1st of 2014, we acknowledge the only  
7 fact we allege with respect to these profits being paid back  
8 are the fact that in the CFTC complaint that said the conduct  
9 continued through at least 2014 and on FX's website, they  
10 indicated that they were still a provider for FXCM. So we  
11 acknowledge that with respect to beyond August 1st of 2014,  
12 those are the only facts we have. But before that period, we  
13 have a slew of facts that demonstrate the payments.

14 This idea that the services agreement --

15 THE COURT: -- class period.

16 MR. KIM: Pardon?

17 THE COURT: Including within the class period.

18 MR. KIM: Within the class period, because the class  
19 period starts in 2012.

20 This idea that the case is about this services  
21 agreement, it's about the false statements with respect to the  
22 company's conflict-free platform. It was the centerpiece of  
23 their business. They say in their 10-K that that's the core of  
24 their retail trading operation. So it's extremely material to  
25 investors.

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1 And at the hearing when we were here last time, the  
2 Court said it's not enough -- and I think this is relevant to  
3 falsity and *scienter*, because a lot of the arguments from  
4 Mr. Bessette are inferences based upon the services agreement.

5 And the Court said something like, It's not enough for  
6 plaintiff to just say that the defendants were aware of the  
7 services agreement. We need to allege facts, whether direct  
8 facts or circumstantial, under *Tellabs*, to demonstrate that  
9 these people acted in bad faith to defraud investors.

10 So if we look at the facts, these aren't conclusions,  
11 they are facts in the complaint. They may disagree with those  
12 facts and dispute them, but in the complaint we have a number  
13 of facts, taken holistically, demonstrating that the defendants  
14 acted with an intent to defraud investors.

15 First of all, the services agreement was never made  
16 available public in an SEC filing. The first time that the  
17 public has seen eyes on that was with respect to the prior  
18 motion to dismiss when they filed it as an exhibit to a motion  
19 to dismiss. During the class period, the company never  
20 disclosed in an SEC filing that FX was a liquidity provider.  
21 They never disclosed it.

22 THE COURT: Was a what?

23 MR. KIM: Was a liquidity provider; that they had an  
24 agreement with FX. That was unknown to investors. And in  
25 their SEC filings, they made it seem like it was normal for the

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1 company to have paid for flow agreements. But it wasn't. In  
2 the SEC filings, they say, We have these agreements with market  
3 makers, plural, to suggest that perhaps this is a standard  
4 thing.

5 The only such agreement they had was with FX. There  
6 was no other market maker that was provided early peaks, the  
7 whole timer, the information about the client trades ahead of  
8 the trade, no other market maker had that. And all of those  
9 trades, which we allege happened between 2010 and 2014, at  
10 least, favored FX. So no one had that.

11 So then we look at other facts.

12 They say, Well, there's some stuff before -- they  
13 attack the statements, the facts we have in the complaint where  
14 we say that they were untruthful to the regulators, and that  
15 was during the class period. There was an inspection in 2013  
16 and it continued on. And we say that Mr. Niv, in response to  
17 inquiries by the NFA about the relationship with FX, did not  
18 mention any of this information. And he told the NFA that his  
19 relationship with Dittami was with respect to another company,  
20 not with respect to FXCM. And we've alleged those facts in the  
21 complaint, paragraph 87 and continuing on therefrom.

22 So what that indicates is, okay, so they first spun  
23 this company off because their own compliance department says  
24 this is problematic with what we are telling the customers,  
25 right. It's a conflict of interest.

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1           Then, during the class period, while they are engaged  
2           in this conduct, starting in 2013, they are not being truthful  
3           to the regulators. And this is against the backdrop of they  
4           are telling investors that there are multiple market makers.

5           So it seems like at every turn they are misleading the  
6           public, right. This isn't an instance where it's just an  
7           innocent mistake and they have this alleged arm's-length  
8           agreement. If you look at the history and consider the  
9           totality of the circumstances, it indicates fraud. It doesn't  
10          indicate an innocent mistake; it doesn't indicate negligence.

11          THE COURT: Do you want to respond to the argument  
12          that maybe this hurt customers -- I mean they are not conceding  
13          that, but maybe this hurt customers but it didn't hurt  
14          investors. This is the suit brought by investors; there's  
15          another suit, I think, before Judge Crotty with respect to the  
16          customers. How did this actually affect the investors?

17          MR. KIM: Well, it affected the investors from the  
18          standpoint my clients lost a couple million dollars when the  
19          truth of this was announced, right, when ultimately the NFA and  
20          the CFTC put the hammer down, so to speak. There were extreme  
21          penalties. The company, Mr. Niv and Mr. Ahdout, were banned  
22          from the CFTC and NFA. The company had to sell its business  
23          because it could no longer operate in the United States.

24          So unlike the cases that are cited about regulatory  
25          actions or no-fault settlements and things like that, none of

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1 those cases have such harsh penalties. And I think when the  
2 Court is assessing facts with respect to the regulatory  
3 actions, you also have to look at the penalties. These were  
4 harsh penalties. That's what these defendants agreed as part  
5 of a settlement. These people are self-interested; they want  
6 to agree to the best deal possible, and that wasn't a good  
7 deal.

8 And the idea that this only affected potential  
9 customers, this company's business is dealing with customers.  
10 So as we allege in the complaint, in the FX market credibility  
11 is very important because there's no centralized exchange.  
12 People rely on the platform to be trustworthy, to be  
13 transparent. And that's why they marketed themselves as this  
14 agency model. They were saying, You know what? You can trade  
15 on our platform; we're not going to trade against you; we're  
16 just here collecting commissions on the bid and ask.

17 Meanwhile, they have this agreement with FX; they are  
18 driving 50 percent of their trades there. And profits are  
19 being kicked back up to FXCM 70/30, consistent with the  
20 original agreement with Mr. Dittami.

21 And the other fact is -- here's another fact -- those  
22 profits were not only treated as profit and loss by FXCM  
23 itself, that's how they did it, they received weekly reports,  
24 instead of funneling those payments back to the holding -- the  
25 operating subsidiary, right, the services agreement is between

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1 FX and the operating entity, they funneled that money back up  
2 to the holding company. And that's because we allege to add  
3 another layer of -- to hide that from the regulators because  
4 the holding company itself wasn't registered with the NFA.

5 So with every little step when they were dealing with  
6 FX, they hit it, they misled regulators. In describing it to  
7 investors they never even mentioned FX; they said there were  
8 multiple market makers, and that they were receiving order flow  
9 payments from multiple market makers, when there was just one.

10 So when the Court takes the totality of those  
11 circumstances, they all point in one direction, is that there's  
12 something amiss here; that there's fraud.

13 And the inferences that Mr. Bessette says that, Well,  
14 this is just a contract. And if that's all we had, then that's  
15 a good argument. But we have all these other facts that the  
16 Court must consider.

17 And even if the Court were to say -- were to only  
18 uphold the statements about conflict of interest and the  
19 services agreement was terminated on August 1st of 2014, as we  
20 say in our papers, the company continued to talk about order  
21 flow payments and the like throughout 2015.

22 So the company's --

23 THE COURT: You think misstatements were made after  
24 the August 2014 date?

25 MR. KIM: That's correct.

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1           For example, the company's 10-K for 2014, which covers  
2           August of 2014, was filed on March 16, 2015.

3           I'm sorry.

4           The company's annual report for fiscal year 2014 was  
5           filed on March 16th, 2015. So if the Court were to assume  
6           conflict-type misstatements ended on August 1st, it would be  
7           included in the March 16th, 2015 10-K, which covered that  
8           period.

9           THE COURT: Did it an improper relationship with FX  
10          continue past the August 2014 date, or is your position no, but  
11          misstatements about the prior relationship --

12          MR. KIM: We believe that it -- we allege that we  
13          believe that it may. But I understand with respect to  
14          pleading, as I said earlier, we only have two facts to support  
15          that, which, frankly, are pretty thin, which is the CFTC says  
16          that the relationship continued at least through 2014; and the  
17          fact that FX's website recently, when we had filed the  
18          complaint, around that time had also indicated they were still  
19          working with FXCM. So we acknowledge that those are the only  
20          facts we have with respect to that.

21          So if the Court were to only say, Plaintiffs have only  
22          stated a claim with respect to the conflict statements, we  
23          would say that the class period would extend through March 16  
24          of 2015, because that's when the company filed the 10-K for  
25          2014, which covered the period up to August 1st.

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1 But we do allege other misstatements here with respect  
2 to the company's failure to disclose the ongoing investigations  
3 that it had with the NFA and CFTC. And I think the case that's  
4 very similar to the case here is the *Och-Ziff* case that we  
5 cited. And in this instance, the company disclosed at the  
6 beginning of the class period that -- paragraph 164. It says  
7 that their business is subject to extensive regulation which  
8 may result in administrative claims.

9 And we allege that based upon the history of the  
10 investigation with the CFTC and the NFA, that the company had a  
11 duty to disclose that they were being investigated.

12 THE COURT: Where did FXCM actually misrepresent that  
13 it was under regulatory investigation?

14 MR. KIM: We allege that it was in the company's SEC  
15 filings. In their SEC filings they have a statement, paragraph  
16 164 is an example, where it says that their business is subject  
17 to extensive regulation, which may result in administrative  
18 claims and investigations.

19 And our contention is is that it wasn't "may," it was  
20 actually happening; and it was happening to a core part of  
21 their business.

22 If you just look at the CFTC, we know on August -- and  
23 it's paragraph 166 in the complaint. On August 15th, 2014, the  
24 CFTC made a request for production for quote -- and it's also  
25 set forth in paragraph 71 -- FX's business and/or financial

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1 reporting relationship with FXCM, including, but not limited  
2 to, FX relationship as a liquidity provider to FXCM.

3 So they knew on October 15th of 2014 the CFTC was  
4 requesting information regarding relationship.

5 Then, on July 2nd of 2015, the company received a  
6 preservation notice. That's paragraph 77 of the complaint.  
7 And on August 13th of 2015, they also received a notice  
8 regarding, quote, relating to FX, the creation of FX, FX's  
9 operation and/or financial relationship with FXCM, and FX's  
10 role as a liquidity provider and/or market maker to FXCM.

11 So the CFTC, starting in 2014 and continuing out to  
12 2015, was asking questions about FX's relationship. And at the  
13 time there's no dispute that FX was doing anywhere between 50  
14 to 80 percent of the volume. So clearly it was material. It  
15 affected their retail.

16 And if you look at NFA -- this is all happening at the  
17 same time -- the NFA, on October 24th of 2013, it's during the  
18 class period, met with FXCM executives about and asked  
19 questions about their relationship with Mr. Dittami and FX.

20 THE COURT: So right now you're referring to the 2016  
21 Q3 10-K, the statement that the CFTC and the NFA are currently  
22 examining the relationship with U.S., meaning FXCM's U.S.  
23 subsidiary and one of its liquidity providers, are you focusing  
24 on that statement?

25 MR. KIM: No, no. What we are saying is ultimately

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1 they did disclose something, we are saying.

2 In the beginning of this class period when this  
3 happening, they never disclosed anything. It wasn't until  
4 November 18th of 2016, which I believe is paragraph 168 you may  
5 be looking at, is when they finally disclosed something where  
6 they say the CFTC and NFA are currently examining the  
7 relationship with us and one of its liquidity providers.

8 So the second set of misstatements, what we are saying  
9 is is that when the CFTC and the NFA were looking at this, were  
10 investigating this starting in 2013, that they should have  
11 disclosed that the CFTC and NFA were investigating this,  
12 because it was material and the duty arose --

13 THE COURT: There's no independent duty for a company  
14 to disclose that it's being investigated, right? If they talk,  
15 they have to be honest about it.

16 MR. KIM: That's correct.

17 THE COURT: There's no independent duty to disclose.

18 MR. KIM: That's correct.

19 We're saying that the independent duty arose when the  
20 company, for example, in paragraph 164, had said that their  
21 business is subject to extensive regulation which may result in  
22 administrative claims and investigations and regulatory  
23 proceedings against us.

24 THE COURT: Is that true?

25 MR. KIM: Pardon?

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1 THE COURT: Is that not a true statement?

2 MR. KIM: It is. But it's misleading because it says  
3 it may. And at the time we say that they were. And that's  
4 exactly what the holding in *Och-Ziff* was. In *Och-Ziff*,  
5 Och-Ziff was a financial company, a private financial company  
6 that was publicly listed.

7 And what happened was the company had a similar  
8 disclosure, saying that, We may be subject to regulatory  
9 oversight, government regulation, very general risk statement.  
10 But at the time they made the statement, they were, in fact --  
11 they received a subpoena from a regulator.

12 And here it's very similar.

13 Here, they say we may be subject to regulation.  
14 That's accurate, but it's misleading. And that's when the duty  
15 to disclose arises, when an affirmative statement is rendered  
16 misleading by the omission of the information. And that's what  
17 *Och-Ziff* says. And what we are claiming here is that's what  
18 happened.

19 The company is saying that we may be subject to these  
20 inspections and reviews, but at the time they were; it was  
21 actually happening. And it was material. This wasn't -- they  
22 weren't just looking into some immaterial -- some rogue broker.  
23 This was their retail operation. This was involving FX, who  
24 was clearing 50 percent of their trades. So if you look at  
25 that, that would also keep the class period going forward until

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1 about November 18th of 2016.

2 And what's interesting here, your Honor, which  
3 occurred to me, the company canceled its agreement, its paper  
4 agreement, right, on August 1st of 2014. And the CFTC and  
5 NFA -- the NFA started asking questions in 2013. And the CFTC  
6 had made formal requests in October. So that begs the  
7 question, well, perhaps the reason why they, quote, canceled  
8 this agreement was because they felt the heat was coming down  
9 and they knew that they were in trouble. And certainly if they  
10 were aware of that, the inference is that they should have  
11 disclosed that these investigations -- especially in light of  
12 the fact that they say that they may be subject to  
13 investigation.

14 And it makes sense because they made \$80 million from  
15 this arrangement, and all of a sudden they are like, You know  
16 what? we're going to cancel this. It doesn't seem to make  
17 business sense. There's nothing in the public documents that  
18 indicate why they did that. It just says that they canceled  
19 this arrangement. And perhaps they canceled it because the  
20 regulators were closing in.

21 THE COURT: May I ask you a question about GAAP?

22 MR. KIM: Yes.

23 THE COURT: Is your view that defendants knowingly  
24 violated the GAAP provisions at issue, that is, that they had  
25 specific intent to violate the provisions, or is it that they

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1 misrepresented their relationship with FXCM and violated GAAP  
2 even though they didn't have the specific intent?

3 MR. KIM: Well, I think what we're saying is is that  
4 they, the defendants, intentionally engaged in the underlying  
5 conduct. We don't have an allegation that says specifically  
6 Mr. Niv intentionally --

7 THE COURT: Violated GAAP.

8 MR. KIM: -- used the wrong -- violated GAAP.

9 We're saying as a consequence of that, as a  
10 consequence of hiding this information, that they violated GAAP  
11 and, as such, had a false statement.

12 But I think these GAAP provisions, related party  
13 transactions, are simple GAAP assertions. There's case law out  
14 there dealing with related party transactions. I've had a  
15 number of them where the idea that was it an innocent mistake  
16 that they failed to disclose the related party transactions?

17 I would say that the inferences here, given the fact  
18 that they were lying to regulators, that they had the extensive  
19 penalties, that even in their own filings when they are  
20 describing this agreement, they are suggesting that other  
21 people are involved, to suggest that it's something normal, I  
22 would say that the inferences there would suggest that the GAAP  
23 violations here were done in a reckless manner.

24 I understand they say that, you know, Look, there is  
25 an overstatement. E&Y looked at our papers. I acknowledge

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1 that if we had a restatement, it would be a better fact for us,  
2 but it's just not there.

3 THE COURT: This is a totally separate question: What  
4 in your view is the fundamental difference between order flows  
5 and profit-sharing agreements?

6 MR. KIM: I think in this case, if they had disclosed  
7 that all they were receiving was order flow payments, and these  
8 other facts were withheld, these other facts didn't exist, it  
9 wasn't giving FX an edge, it wasn't giving FX an opportunity to  
10 put their interests ahead of the customers, and all they had  
11 was an order flow payment and they were honest that it's only  
12 with this liquidity provider, then I don't think there's a  
13 case.

14 But we are here because they did kickback the profits;  
15 that these people were banned; they paid a \$7 million fine;  
16 they were not truthful to their customers; they were not  
17 truthful to their investors. And ultimately the company had to  
18 file for bankruptcy. So this isn't a situation where all of  
19 this was something else.

20 And touching briefly on it, with respect to loss  
21 causation, I think we've alleged it. I think the argument they  
22 bring up has to do with more of a summary judgment issue,  
23 whether or not the stock price declined was attributed to  
24 something else.

25 We allege that when the information -- the penalties

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1 were announced, the price of the stock dropped and lost over 50  
2 percent of its value, that's sufficient to plead a case. But  
3 as to ultimately what part of the drop during the class period  
4 is attributable to other factors, that's a fact question for  
5 summary judgment or trial.

6 Unless the Court has any other questions, I'll sit  
7 down.

8 THE COURT: All right. Thank you, Mr. Kim.

9 Do you want to respond, Mr. Bessette?

10 MR. BESSETTE: Thank you, your Honor.

11 THE COURT: Just on GAAP, can I hear you out with  
12 respect to if there needs a specific intent to violate the law  
13 there? If I just were to find that plaintiffs have  
14 sufficiently alleged false and misleading statements with  
15 respect to the agency trading model and the order flow  
16 agreements, should I be looking at GAAP differently?

17 MR. BESSETTE: Well, your Honor, I think there are two  
18 questions there.

19 Plaintiffs allege a GAAP violation, which is a false  
20 or misleading statement, that we presented our financials  
21 wrong. And the Second Circuit is very clear. You have to have  
22 an objective event or standard, a restatement or something to  
23 show -- and some of the cases even talk about an expert witness  
24 who says, Yeah, they did this wrong; or a confidential witness  
25 who happened to be in the accounting department who alleged

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1 this. There's nothing here. It's all thin air. It's like  
2 clouds. There's nothing to show a GAAP violation. No  
3 restatement, no indication by E&Y, who did the auditing for the  
4 company, either before or after the regulatory violations were  
5 public, they didn't go back and say, Yes, we agree, you have to  
6 restate and you have to treat FX as a related party or  
7 whatever. There is absolutely nothing other than the predicate  
8 conclusion that there was a profit-sharing arrangement. So we  
9 submit they haven't alleged a false statement.

10 And then GAAP is sometimes used to show an inference  
11 of *scienter*. And we know the case law there is a GAAP  
12 violation alone does not show a strong inference of *scienter*.  
13 We don't have a GAAP violation and we don't have *scienter*  
14 related to GAAP.

15 Have I answered your question?

16 THE COURT: I don't think it really answered my  
17 question, but you made your point.

18 MR. BESSETTE: I want to answer your question. I'm  
19 sorry.

20 THE COURT: No, no, it's okay.

21 My question was if I were hypothetically to find that  
22 plaintiffs had sufficiently alleged false statements with  
23 respect to the agency trading model and the order flow  
24 agreements, is there some other defense that you have with  
25 respect to the GAAP violations?

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1 As I heard your answer, your answer was, Well, they  
2 didn't do any of this, so you can't find a GAAP violation.

3 For example, is specific intent required? Do you need  
4 to know that you're specifically violating GAAP? Is there some  
5 other -- I'm just asking if there's some other defense that you  
6 have with respect to GAAP.

7 MR. BESSETTE: I think there has to be -- for a  
8 financial statement to be false or to be in violation of GAAP,  
9 there has to be red flags or some indication that you are doing  
10 something intentionally, right, or severely recklessly. Just a  
11 mere GAAP violation in and of itself is not *scienter* and it's  
12 not a false -- it may be incorrect, but it's not necessarily a  
13 false statement.

14 So I would say it doesn't show a false statement, it  
15 doesn't show *scienter*. We don't even have a GAAP violation  
16 here, according to anyone other than the plaintiffs in the  
17 complaint. There's no indication. Under the Second Circuit  
18 law it is clear that there's no adequate allegation of a GAAP  
19 violation in the first place.

20 And then I would say on top of that, if we're talking  
21 about GAAP, there's clearly no corrective disclosure about  
22 GAAP. There was no indication that there was any problem with  
23 the financial statements. So without a corrective disclosure,  
24 there clearly is no loss causation for any of the stock drop  
25 related to a GAAP violation. So GAAP's got problems with the

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1 material statement, *scienter*, and loss causation.

2 THE COURT: And how do you respond to plaintiffs'  
3 answer with respect to how the investors were harmed here? I  
4 asked you earlier the difference between let's say there's an  
5 intent here, let's say I think that there has been adequate  
6 allegations with respect to an intent to deceive customers.  
7 How does that affect investors?

8 You heard Mr. Kim's answer. Do you want to respond to  
9 that?

10 MR. BESSETTE: Well, yes, your Honor.

11 I didn't hear much of an answer other than, Well, the  
12 statements were made in SEC filings which go to investors.

13 But the underlying premise --

14 THE COURT: He also said that there were ultimately a  
15 whole host of fines and stock drop; correct, Mr. Kim?

16 MR. KIM: That's right, your Honor.

17 MR. BESSETTE: Okay.

18 I'd like to unpack that, if I could.

19 THE COURT: Please. Go ahead.

20 MR. BESSETTE: It's important to make the point.

21 Your first question to plaintiffs' counsel was, Please  
22 walk me through the second amended complaint; let me see the  
23 facts alleged during the class period to show false and  
24 misleading statements. That never happened. He didn't do it.  
25 And I submit to you there are none.

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1           And I would ask the Court to go through and look at  
2     the facts that are pled. They are pre class period, not during  
3     the class period. The only facts pled during the class period  
4     show an order flow payment as the basis for FX making payments  
5     to FXCM, pursuant to a services agreement. And FX, by the way,  
6     was disclosed on the company's website as a liquidity provider.  
7     That is according to plaintiffs' own complaint and opposition.

8           Second, the company disclosed that it got paid for  
9     order flow. Whether from liquidity providers or a provider, it  
10    got paid and it disclosed that it got paid for order flow. So  
11    there's no misleading omission or statement there.

12          But importantly, this idea of misleading -- well, the  
13    agency trading model, okay -- so I would like to have the Court  
14    look to paragraph 146, because that's what plaintiffs pointed  
15    to. And there's a fundamental problem here, a disconnect.  
16    Because the plaintiffs say that the foremost falsehood in our  
17    public filings is the characterization that its agency trading  
18    model would be free from conflicts of interest because FXCM  
19    would not have a financial interest in the opposing side of the  
20    trades. That's in their opposition. That's the centerpiece of  
21    their false and misleading statement about the agency trading  
22    model.

23          The problem is the company never said that. If you  
24    look at paragraph 146, the company said -- second or so  
25    paragraph down -- that it believes -- it's an opinion

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1 statement. It believes that the agency trading model aligns  
2 our interests with those of our customers and reduces our risk.

3 As an opinion statement, we know --

4 THE COURT: Did they know that not to be true?

5 MR. BESSETTE: Where are the allegations though in the  
6 complaint, your Honor? There are none. They have to meet the  
7 *Omnicare* standard to show that the speaker didn't hold the  
8 belief, or the supporting facts supplied were untrue, or the  
9 speaker omits information that makes the opinion statement  
10 misleading to a reasonable investor.

11 There is no factual support. There's no documentary  
12 evidence, there's no conflicting statements by Niv, Ahdout, or  
13 Lande, that they didn't believe that the agency trading model  
14 aligned their interests with those of their customers. Or that  
15 there was no reasonable basis. And that goes to your question  
16 about was this misleading to investors when the company says,  
17 This model aligns our interests with those of our customers.

18 If there's no profit-sharing relationship between FXCM  
19 and FX, how is that a false opinion statement? They have to  
20 have the facts to show that. They have to show that Niv didn't  
21 believe that or Lande or Ahdout.

22 Where is the evidence pled?

23 They do have a pleading burden, your Honor.

24 And this is telling. Because instead of walking you  
25 through statements, like you asked, it is all about the

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1     atmospherics. Well, there were fines, and there were, you  
2     know, this and that, and so that must be enough, there must be  
3     fraud here.

4             If you dissect the second amended complaint and hold  
5     the pleading burden -- hold plaintiffs to the pleading burden,  
6     both for false and misleading statements and *scienter*, we say  
7     it's just not there. It is not there.

8             And another example, failure to disclose the  
9     investigations. I'd like to look at that.

10            Plaintiffs were hanging their hat on the statements to  
11     regulators as showing *scienter*. And they talk about the  
12     *Och-Ziff* case, which is, again, in this Court in 2017.

13            This case -- that case is very different in that --  
14     hold on. I'm sorry. I got sidetracked here.

15            Right. So in that case the Court found that the  
16     statements were actionable under 10b, as plaintiffs allege  
17     here, because they plausibly allege that Och-Ziff misled  
18     investors by suggesting that the company was not -- this is the  
19     regulatory investigations. That the company there said it was  
20     not facing an investigation that would have a material impact  
21     on its business.

22            And the plaintiffs say, This case is a lot like that.  
23     They said, We are under investigations and it may have an  
24     impact, and so we should look to this case.

25            But that case is very different because there the

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1 company said, We are not currently subject to any pending  
2 regulatory, administrative, or arbitration proceedings that we  
3 expect to have a material impact on the results of our  
4 operations or financial conditions. FXCM never made an  
5 absolute statement like that. It said it was constantly under  
6 investigation and examination by these regulatory agencies.  
7 And I think your Honor asked, isn't that a true statement, and  
8 it is.

9 So they pivot in their opposition that, Well, it's  
10 misleading because you didn't disclose this. There's no duty  
11 to disclose an ongoing investigation.

12 The company never made an absolute statement like the  
13 *Och-Ziff* case, that they weren't under investigation. And  
14 that's the material difference there. So the idea that there's  
15 a false or misleading statement or evidence of *scienter* because  
16 of the disclosures around regulatory investigations, the law  
17 does not support their case and their very case makes that  
18 point.

19 I would also submit that when you take away the  
20 conclusions, when you take away the fact that statements to  
21 regulators who don't have a purview of the securities laws  
22 under their charge, there's no law that says that is evidence  
23 of *scienter*.

24 The agency trading model statements were true. They  
25 are opinion statements and they haven't met their burden under

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1     Omnicare to show falsity or *scienter*. GAAP violations, in our  
2     view, fall away. There's absolutely nothing. Second Circuit  
3     law is clear that there's no objective statement or standard  
4     there to show a GAAP violation. So either falsity, *scienter*,  
5     or loss causation, because it was never a corrective  
6     disclosure.

7             And I was amazed to hear, Well, there must be  
8     something wrong here, your Honor, because the company  
9     terminated the agreement in August of 2014. Maybe it was  
10    because the regulators were getting close to -- this is all  
11    like writing a novel.

12            This is a PSLRA pleading case with very clear pleading  
13    standards for falsity, *scienter*, and loss causation. And we've  
14    laid out in our briefs, when you strip away the atmospherics,  
15    they haven't met their pleading burden; they haven't met the  
16    standard. You asked them to the first time around, which is to  
17    plead facts, not conclusions; and certainly facts within the  
18    class period, not prior that they just string along as, well,  
19    this has to be how it was. The Second Circuit says those kinds  
20    of pretext secret relationship cases have to be supported by  
21    sufficient facts. If you look at those cases which we cited,  
22    your Honor, they don't have the facts here.

23            With that, unless the Court has questions.

24            THE COURT: Thank you.

25            MR. BESSETTE: Thank you.

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MR. KIM: Brief rebuttal, your Honor.

THE COURT: Sure.

MR. KIM: I'm just going to be brief here, your Honor.

With respect to the false statement, the *Omnicare* argument, if you look at paragraph 146 of the complaint, in *Omnicare*, the standard is either the speaker did not hold the belief to supporting facts were untrue, or omits information that makes the opinion misleading.

This is just one paragraph from the 10-Ks, the various 10-Ks. And it talks about the agency model. And it says: We believe that it aligns our interests with those of our customers and reduces our risk.

Then it goes on to talk about how the agency model functions, that it executes the trade on the price quotation offered by FX market makers, acts as a credit intermediary, riskless principal, and so on. So the subsequent sentences and the sentences before that are factual statements, they are not opinion statements. And they all go toward the idea that in this agency model that they are getting the best execution.

In reality, when you look at paragraph 147, and also if you cross-reference paragraphs 64 to 66, which talk about the advantages that FXCM gave, because that's the specificity and 147 is the summation of it, that wasn't happening, at least to 50 percent of the trades and, at some point, 80 percent. Because FX was getting the whole timer; they were getting the

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1 edge. So that when a customer put in a limit order, FX would  
2 be able to have that information and get prices that were  
3 disfavorable to the client.

4 So this idea that this one opinion that we believe,  
5 the whole set of statements here are misleading because the  
6 supporting facts are not accurate and --

7 THE COURT: But put aside the opinion argument for a  
8 minute. I think part of what defendants are arguing is that  
9 there is nothing to show that there was this improper  
10 relationship during the class period.

11 MR. KIM: We've alleged it in the complaint. It  
12 starts from the introduction of the complaint of the genesis of  
13 FX, of why it was started. It was started because there was a  
14 compliance issue. And then Mr. Niv and Mr. Ahdout had come  
15 with the idea that they would spin it out and they would still  
16 maintain a 70/30 split. That the company would give it an  
17 interest-free loan. These are sweetheart-type terms that you  
18 would give to, as we allege, a hidden subsidiary, right. They  
19 let them use their offices; they let them use their employees.

20 THE COURT: -- was focused on the class period.

21 MR. KIM: That goes in. That was before the class  
22 period. But then during the class period they were continuing  
23 with this arrangement, right. I think the history of it is  
24 important because it shows the bad faith. It shows the intent  
25 to defraud. From the beginning this thing was designed to

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1 skirt issues. And then when they were asked about it, they  
2 weren't truthful.

3 So I think this notion that we don't allege facts, we  
4 do allege facts. These are facts that the regulators asked  
5 them a question, they gave them a response which was untrue,  
6 right. They received document requests; they received  
7 subpoenas from the regulators. Those are facts, they are not  
8 conclusions. They had to pay a \$7 million fine. They were  
9 banned from the industry. Those are facts. That happened  
10 during the class period.

11 So this idea that it's conclusory --

12 THE COURT: To what extent do you think I can rely on  
13 their being banned from the industry and the agreement reached?

14 MR. KIM: I think you can for the purposes of alleging  
15 a claim. We cited those cases. I know this wasn't an issue  
16 necessarily in this case, but we briefed it previously. I  
17 think it was the *Lipsky* case that we talked about, which is a  
18 Second Circuit case that talks about this. I think Judge Cote  
19 had a decision interpreting *Lipsky* in the broader sense, not  
20 the narrow sense -- or reading *Lipsky* narrowly, rather than  
21 broadly, to exclude.

22 So I would say your Honor has already ruled on that  
23 issue; it's law of the case; that the Court could rely on it.

24 THE COURT: Is there anything else you want to say in  
25 response to the argument that even if this arguably harmed

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1 customers, it didn't harm the investors? I think you spoke to  
2 it already, frankly.

3 MR. KIM: To me it doesn't make any sense, because  
4 this is a company that deals with retail customers. And in any  
5 business your reputation with customers is paramount, right.  
6 If you have a bad reputation, particularly when you're dealing  
7 with people's monies in a virtual type business where you don't  
8 see a building, you don't see a big building with columns, you  
9 just see a company and they are professing to be independent,  
10 of course it hurt investors. That was their business. They  
11 just got caught. And, of course, the stock went down, the  
12 company filed for bankruptcy, and those facts are asserted.

13 I think it's sort of like a materiality argument, the  
14 way I see it, saying, Well, since it didn't hurt investors,  
15 maybe it wasn't that material. But it wasn't a 10-K. That  
16 goes to investors; that's what people read about. When you  
17 look at a 10-K, you look to see what the company does, what  
18 their niche is, what their pitch is, and that was their pitch.

19 So I sort of view it as a materiality argument; that's  
20 more of a factual type issue of how material it was. I don't  
21 view it as whether it was actionable because it was directed to  
22 consumers or investors.

23 THE COURT: Is there anything else you'd like to say?

24 MR. KIM: Nothing, your Honor. Thank you.

25 THE COURT: Thanks, all.

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1 I'm going to reserve judgment.

2 MR. BESSETTE: May I have one minute, your Honor?

3 THE COURT: Yes. Sure.

4 MR. BESSETTE: If I might? Just one minute.

5 Counsel said that history is important, right. Again,  
6 what I've been saying, prior to the class period and to the  
7 class period -- and that's exactly what this Court in the  
8 *SkyPeople Fruit Juice* said was a problem.

9 The Court said: Plaintiffs do not explain why events  
10 surrounding the founding of BOLI in 2005 have any relevance to  
11 its ownership in 2008 or 2009. That's why I'm focusing on  
12 class period statements.

13 THE COURT: But here isn't the background to this  
14 alleged agreement important?

15 MR. BESSETTE: It is, your Honor, to understand maybe  
16 how it came about. But to allege that it was a secret  
17 profit-sharing relationship and not as, on its face, with  
18 agreements and contracts, an order flow arrangement, you have  
19 to have the facts. And the fact that it started as one thing  
20 and a company spun this company out, helped it to grow, yes,  
21 used its offices, had a short-term loan, but at the start of  
22 the class period, there is a contract, there is a relationship  
23 based on order flow. There is not a profit-sharing because you  
24 don't see payments being made on profits. You don't see that.

25 So the history, sure, it's important to understand.

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1 But as the district court said here, what is the relevance of  
2 that to what you're alleging in this class period? And where  
3 are the facts? If they had the facts, they should allege them.  
4 And I'm saying, your Honor, they don't.

5 And the last thing I would say is nowhere -- and their  
6 whole case is based on the CFTC order, the NFA complaint, and  
7 the NFA decision. Nowhere in any of those documents do the  
8 CFTC or the NFA contend that paper flow agreements were illegal  
9 or improper; nor do they contend that FXCM's relationship with  
10 FX caused FXCM's customers to lose money on their FXCM trades;  
11 nor do they allege that this relationship harmed FXCM  
12 shareholders. There is none of that. Plaintiffs are saying  
13 that in the complaint without adequate and sufficient facts.

14 That's our argument.

15 Thank you, your Honor.

16 THE COURT: Thanks, all.

17 I'm going to reserve judgment.

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